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Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 716

Cases No. 777: KHADRA
No. 780: FAHOUM
No. 781: NOURALLAH
No. 783: ZEIDAN
No. 784: KHALAF

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 17 January 1994, Lufti Abed Khadra and Ata Mohammed Zeidan, on 27 January 1994, Suheir Fadeel Fahoum, on 3 February 1994, Mu'azzaz Mohammed Ali Nourallah and on 14 February 1994, Atweh Hamad Khalaf, all area staff members of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, hereinafter referred to as UNRWA, filed an application containing pleas which, *inter alia*, request the Tribunal to:

> "[Order the production of a number of documents relating to the conditions of service of UNRWA Area staff members.]
>
> (1) [Rescind] the decision of the Commissioner General ...
>
> (2) [Consider] the Applicant [Khadra's] period of continuous service from 13.10.1962 to 18.08.1986, a period of service qualifying for termination indemnity.

[Consider] the Applicant [Zeidan's] period of continuous service from 12.10.1963 to 30.09.1985, a period of service qualifying for termination indemnity.

[Consider] the Applicant [Fahoum's] period of continuous service from 1.9.1964 to 21.11.1971, a period of service qualifying for termination indemnity.

[Consider] the Applicant [Nourallah's] periods of continuous service from 9 September 1961 to 12 October 1979, and from 12 October 1981 to 28 November 1984, as periods qualifying for termination indemnity.

[Consider] the Applicant [Khalaf's] continuous period of service from 10.11.1965 to 6.10.1981 as a period qualifying for termination indemnity.

(3) [Apply] the UN operational rate of exchange of US$1 = LS11.20, for the purpose of payment of termination indemnity due to the Applicant [Khadra] for the periods from 13.10.1962 to 30.5.1992.

... due to the Applicant [Zeidan] for periods from 12.10.1963 to 30.05.1992.

... [due to the Applicant Fahoum] for periods ending on 30.5.1992.

... [due to the Applicant Nourallah] for periods ending on 31 May 1992.

... [due to the Applicant Khalaf] for periods ending on 31 May 1992.

(4) [Allow] the Applicant[s] to opt for early voluntary retirement at the age of 50, or at having 25 years of qualifying service.

(5) [Apply] the UN operational rate of exchange prevailing during every given period of qualifying service after 30.5.1992, on the basis of salary on termination.

(6) [Order] payment of legal counseling and secretarial fees estimated at US$2,000."

Whereas the Respondent filed his answer on 27 June 1994, in the case of Mr. Lufti Abed Khadra;

Whereas the Respondent filed his answer on 28 June 1994, in the cases of Mr. Ata Mohammed Zeidan and Ms. Mu'azzaz Mohammed Ali Nourallah;

Whereas the Respondent filed his answer on 30 June 1994, in the case of Ms. Suheir Fadeel Fahoum;

Whereas the Respondent filed his answer on 25 July 1994, in the case of Mr. Atweh Hamad Khalaf;

Whereas all the Applicants filed written observations on 12 September 1994;

Whereas the facts in the cases are as follows:

The Applicant Khadra, an Area staff member, entered the service of UNRWA on 13 September 1962 as a Teacher. He served UNRWA until 20 August 1986, when he resigned "for private reasons". At the time, the Applicant was paid all of his separation entitlements, including his Provident Fund benefits.

The Applicant was re-employed by UNRWA, as an Elementary Teacher, on a temporary assistance basis, on a fixed-term appointment lasting from 26 September to 30 November 1987. He was subsequently reappointed as a Teacher D, with effect from 1 December 1987. His appointment was converted to a temporary indefinite appointment, with effect from 1 September 1988. At the time of his reappointment, the Applicant elected in the form personnel directive A/4/Rev.4/Amend.9, dated 11 August 1986 (Option for Reinstatement or Reappointment), to be reappointed rather than reinstated. In exercising the option, the Applicant knew that his service computation date would be his date of re-employment, i.e. 1 December 1987.

The Applicant Fahoum, an Area staff member, entered the service of UNRWA on 1 September 1964 as a Teacher. She served UNRWA until her resignation on 21 November 1971. At the time, the Applicant was paid all of her separation benefits.

The Applicant was reappointed as a Teacher, with effect from 19 September 1973, and this date was deemed to be the "service computation date" for purposes of determining entry into UNRWA's service.

On 20 September 1989, the Applicant Fahoum requested that her reappointment in 1973 be converted to a reinstatement and that her service between 1969 and 1971 be taken into account. She alleged she was never informed of the option to be reinstated announced to the staff in an administrative circular of 21 January 1980. This request was denied on 23 September 1989.

The Applicant Nourallah, an Area staff member, entered the service of UNRWA on 9 September 1961 and served thereafter as a Teacher until her resignation in 1979. She was reinstated in 1981, electing to repay all of her separation benefits. The Applicant continued to serve UNRWA until 10 November 1984, when she resigned. At that time, she was paid all of her separation benefits, including her Provident Fund benefits.

Following an exchange of correspondence with the Field Director and the Field Personnel Officer, the Applicant was reappointed, with effect from 1 December 1985. At the time of her reappointment, when she could opt for reinstatement or reappointment, she chose to be reappointed rather than reinstated. When exercising the option to be reappointed the Applicant knew that her service computation date would be her date of re-employment, in this case, 1 December 1985.

The Applicant Zeidan, an Area staff member, entered the service of UNRWA on 12 October 1963 and served thereafter as a Teacher until his resignation on 30 September 1985. At that time, the Applicant was paid all of his separation benefits, including his Provident Fund benefits.

From 13 September until 31 October 1986, the Applicant was re-employed by the Agency on a temporary assistance basis. He was subsequently reappointed, with effect from 1 November 1986. At the time of his reappointment, when he could opt for reinstatement or reappointment he chose to be reappointed rather than reinstated. When exercising this option, the Applicant knew that his service computation date would be his date of re-employment, in this case 1 November 1986.

The Applicant Khalaf, an Area staff member, entered the service of UNRWA on 10 November 1965 and served thereafter as a Teacher until his resignation on 6 October 1981. At that time, the Applicant was paid all of his separation benefits, including his Provident Fund benefits.

The Applicant was subsequently reappointed, with effect from 10 September 1983. At the time of his reappointment, when he could opt for reinstatement or reappointment, he chose to be reappointed rather than reinstated. When exercising this option, the Applicant knew that his service computation date would be his date of re-employment, in this case, 10 September 1983.

On 5 January 1992, the Commissioner-General issued Syrian Field Circular No. 17/92 (the "Circular") to allow, as an exceptional measure, area staff members reaching the age of fifty (50) or completing twenty-five (25) years of service with UNRWA on or before 29 February 1992, to opt for early voluntary retirement, with effect from 29 February 1992 and receive their retirement benefits calculated at the United Nations operational exchange rate of 11.20 Syrian pounds to one United States dollar. Applications to exercise this option were to be submitted by 5 February 1992, and thereafter, early voluntary retirement, with benefits paid at the new exchange rate, would be governed by the Area Staff Rules.

On or about 3 May 1992, the Applicants Nourallah, Zeidan and Khalaf, with others, submitted a petition to the Director of UNRWA Affairs, Syria, requesting that their service computation date be changed to reflect their prior service with UNRWA, so that they would be able to retire voluntarily under the terms stated in the Circular, thus receiving the more favourable exchange rate offered therein. In replies dated 20 May 1992, the Director of UNRWA Affairs, Syria, informed the Applicants Nourallah, Zeidan and Khalaf, as follows:

"While I can readily understand and sympathize with your desire to have this earlier service recognized, I regret it is not possible. The Agency rules are very clear. You have already received whatever separation benefits were due to you at the time of your resignation. As you elected to be re-employed by reappointment rather than reinstatement, only your present period of employment can be taken into account in computing any future separation benefits."

On 24 January 1993, the Applicant Fahoum wrote to the Director of UNRWA Affairs, Syrian Arab Republic (SAR), requesting that her service computation date be changed to reflect her service with UNRWA from 1964 to 1971, so that she would be able to retire voluntarily under the terms stated in the Circular, thus receiving the more favourable exchange rate offered therein. In a reply dated 25 January 1993, the Field Director informed the Applicant Fahoum that her prior service could not be recognized under the Area Staff Rules. He noted that staff members had been given an opportunity in 1980 to elect to have such prior service recognized for purposes of calculating separation benefits, provided that they repaid all separation benefits previously paid to them, but the Applicant Fahoum had failed to take up this offer, which had long since expired.

After additional correspondence with the Field Director, the Applicants Nourallah and Khalaf lodged an appeal with the Area Staff Joint Appeals Board, on 10 February 1993. The Applicant Zeidan lodged his appeal on 24 February 1993 and the Applicant Fahoum on 12 March 1993. On 14 April 1993, the Applicant Khadra wrote to the Director of UNRWA Affairs, SAR, requesting that his service computation date be changed to reflect his prior service with UNRWA from 1962 to 1986, so that he would be able to retire voluntarily under the terms stated in the Circular, thus receiving the more favourable exchange rate offered therein. In a reply dated 29 April 1993, the Field Personnel Officer stated:

"While I sympathize with your request, I regret to have to advise you that the Agency rules are quite clear. You have already received your separation benefits for the years of your first period of employment, and by opting against re-instatement, upon your re-employment in 1987, you chose not to benefit from the higher salary level in effect on your retirement date."

On 10 May 1993, the Applicant Khadra lodged an appeal with the Area Staff Joint Appeals Board.

The Board adopted its report on all the above cases in October 1993. Its recommendation in the Nourallah case reads as follows, which with the requisite changes in the references to employment records also applies to the other Applicants:

> "IV. *Recommendation*
>
> 19. In view of the foregoing, and without prejudice to any further oral or written submissions to any party the Appellant may deem pertinent, the Board unanimously makes its recommendation to uphold the Administration's decision not to recognize the Appellant's earlier UNRWA service prior to her re-employment by reappointment effective 1 December 1985 for purposes of qualifying service under Area staff rule 109.2 and SAR staff circular 17/92; and that the case be dismissed."

On 9 November 1993, the Commissioner-General transmitted to the Applicants Nourallah, Khalaf, Zeidan and Khadra copies of the Joint Appeals Board report and informed them as follows:

> "You will note that the Board concluded that the Administration dealt with your case within the framework of standing rules and personnel directives governing employment, re-employment, early voluntary retirement and service computation date without allowing any extraneous or unrelated factors to affect its decision. You will further note the unanimous recommendation of the Board to uphold the Administration's decision not to recognize your earlier UNRWA service prior to your re-employment by reappointment effective 1 December 1985 for purposes of qualifying service under Area staff rule 109.2 and SAR staff circular 17/92, and that your case be dismissed. I accept this conclusion and recommendations of the Joint Appeals Board."

On 15 November 1993, the Deputy Commissioner-General transmitted to the Applicant Fahoum a copy of the Joint Appeals Board report and informed her as follows:

> "You will note that the Board concluded that the Administration dealt with your case within the framework of standing rules and directives concerning

employment, early voluntary retirement, and service computation date without allowing any extraneous or unrelated factors to affect its decision. Based on this conclusion, the Board unanimously makes its recommendation to uphold the Administration's decision not to recognize your earlier UNRWA service prior to your reappointment effective 19 September 1973 for purposes of qualifying service under Area staff rule 109.2 and SAR staff circular 17/92, and that your case be dismissed. However, with a view to the possibility that you might not have been notified of the Staff Circular of 30 June 1980, in which staff members were invited to exercise the option to include their prior service for the purpose of establishing a service computation date, the Board also recommends that your case be given further consideration by the Administration.

I accept the conclusion of the Board concerning the proper manner in which the Administration dealt with your case, and based upon this conclusion, the Board's recommendations concerning non-recognition of your prior UNRWA service for the purposes stated, and dismissal of your case. As to the Board's further recommendation, having taken into account the Board's request for 'further consideration', I do not find any justification to vary the Administration's decision, which the Joint Appeals Board has unanimously recommended should be upheld."

On 17 and 27 January and 3 and 14 February 1994, the Applicants filed with the Tribunal the applications referred to earlier.

Whereas the Applicants' principal contentions are:

1. The Respondent misapplied the rules by refusing to recognize the Applicants' right to validate their service prior to re-employment for the purpose of determining their eligibility for early retirement.

2. According to circular No. 17/2 of 5 January 1992, the Applicants should have been able to opt for early retirement at the exchange rates in force earlier, which were more favourable.

3. The Respondent's decision that staff members are entitled to early retirement if they are reinstated - i.e. provided that they reimburse all the separation benefits they have received - but do not have this right if they are reappointed without repaying those benefits, is discriminatory.

4. Changing exchange rates to the detriment of staff members violates their acquired rights.

Whereas the Respondent's principal contentions are:

1. Although the term "years of service" is not explicitly defined, Circular 17/92 of 5 January 1992 and directive A/4 show clearly that the length of "qualifying service for early retirement" is measured from the service computation date. According to the Circular, for staff members who have chosen not to repay their separation benefits that date is the same as the date of their reappointment, which is the case for the Applicants.

2. The Applicants failed to comply with the time-limit set in the 1992 Circular, without providing any explanation.

3. The difference between rights to early retirement resulting from the distinction between reappointment and reinstatement is reasonable and just.

The Tribunal, having deliberated from 10 to 28 July 1995, now pronounces the following judgement:

I. The applications of Mr. Khadra, Mr. Khalaf and Mr. Zeidan and those of Ms. Fahoum and Ms. Nourallah have the same purpose and are based on identical arguments. The Tribunal therefore orders the joinder of these applications and will rule on them in a single judgement.

II. The Applicants entered the service of UNRWA in the 1960s (the Applicant Khadra on 13 September 1962, the Applicant Khalaf on 10 November 1965, the Applicant Zeidan on 12 October 1963, the Applicant Fahoum on 1 September 1964 and the Applicant Nourallah on 9 September 1961). After periods of service which varied in length but were relatively long,

the Applicants resigned (the Applicant Khadra on 20 August 1985 after 24 years of service, the Applicant Zeidan on 30 September 1981 after 18 years of service, the Applicant Fahoum on 21 November 1971 after seven years of service and the Applicant Nourallah in 1979 after 18 years of service). Upon their resignation the Applicants received the separation benefits to which they were entitled. But after intervals which varied in length but were in some cases relatively long, the Applicants were re-employed by UNRWA: the Applicant Khadra in 1987 (after an interval of about one year), the Applicant Khalaf in September 1983 (after a two-year interval), the Applicant Zeidan on 31 October 1986 (after a five-year interval) and the Applicant Fahoum in 1973 (after a two-year interval). The Applicant Nourallah, who had repaid her earlier benefits when reinstated in 1981, resigned in 1984 and was re-employed in 1985.

At the time of their re-employment, the Applicants could choose between two options: first, reinstatement, which meant that they would have to repay the separation benefits they had received earlier and that their service computation date would be the date of their first employment; secondly, reappointment, which entailed no repayment but meant that their service computation date would be the date of their re-employment.

With the exception of the Applicant Nourallah, who was reinstated in 1981 after repaying her benefits, the Applicants implicitly chose the second option by virtue of the documents they signed.

IV. The Applicants request that their service prior to re-employment be taken into account in computing their length of service, so that they can benefit from Circular 17/92 of 6 January 1992, according to which staff members who had completed 25 years of service or who had reached the age of 50 could opt for early retirement with benefits calculated using the United Nations operational exchange rate in force before it was changed in 1992. The Applicants base their request on staff rule 109.2(b). This rule does not define the concept of "qualifying service", which could be construed as meaning all periods of service, which

would be cumulative. They contend that the choice offered them upon re-employment was to some extent coercive. Lastly, they claim they have an acquired right to the application, to their benefit, of the exchange rate prevailing prior to the 1992 change.

V. In countering these arguments the Respondent cites the UNRWA rules as defined in personnel directive A/4 of 1 July 1980, which concerns, among other things, the re-employment of staff members and the establishment of their service computation date. The Respondent likewise denies that the choice offered to the Applicants was in any way coercive and that the concept of acquired rights is applicable to the establishment of operational exchange rates.

VI. The Tribunal considers that UNRWA is empowered to adopt special rules applying to its staff so long as those rules are compatible with the United Nations Staff Regulations. The Tribunal also agrees with the Respondent concerning the freedom of the choice offered to the Applicants upon their re-employment. In 1981 one Applicant, the Applicant Nourallah, in fact chose to be reinstated instead of being reappointed. Lastly, it is clear that the Applicants do not have an acquired right to benefit from a specific exchange rate.

VII. The Tribunal notes, above all, that the Applicants voluntarily resigned on various dates during their careers and were subsequently re-employed by UNRWA. The similarity of their conduct shows that resignation followed by re-employment offered advantages justifying this unusual practice, to which some of the Applicants resorted more than once.

The Tribunal considers that having benefited from this systematic practice of resignation followed by re-employment, the Applicants are not entitled to claim reconstitution of their careers as if they had not resorted to that practice.

VIII For all the foregoing reasons, the Tribunal rejects the applications.

(Signatures)

Samar SEN
Vice-President, presiding

Hubert THIERRY
Member

Frances SPAIN
Member

Geneva, 28 July 1995

R. Maria VICIEN-MILBURN
Executive Secretary